APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7717.

ANTOINETTE M. FARACO, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES.

(Argued October 21, 1958. Decided November 3, 1958.)

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and BRYAN, District Judge.

David R. Shelton for Petitioner, and Carter Bledsoe, Attorney, Department of Justice, (Charles K. Rice, Assistant Attorney General; Lee A. Jackson and Melva M. Graney, Attorneys, Department of Justice, on brief) for Respondent.

HAYNSWORTH, Circuit Judge:

Mrs. Faraco and her former husband, as tenants by the entirety with right of survivorship, were the owners of improved real estate in Arlington, Virginia. The original cost was $159,029.33, but, when the husband died on December 26, 1953, it had a fair market value of $650,000. For purposes of the Federal Estate Tax, it was includible in the gross estate of the husband at the current market value. The taxpayer contends that she should be allowed the stepped-up basis for depreciation of the im-

provements in computing her 1954 income tax. The Tax Court denied her claim,[1] and she has appealed.

Though the husband, by will, left his entire estate, real and personal, to his wife, it is clear that she, as the survivor of the tenants by the entirety, holds her present estate, under the laws of Virginia, by virtue of the deed, and she acquired nothing under the will of the husband, *Vasilion v. Vasilion*, 192 Va. 735, 66 S.E. 2d 599. Since she acquired no interest in the land by devise or inheritance, she is limited, under the 1939 Code, to depreciation upon the basis of original cost. *Lang* v. *Commissioner*, 289 U.S. 109, 53 S. Ct. 534, 77 L.Ed. 1066. The fact that Virginia now imposes an inheritance tax upon the surviving tenant based upon the value of the property does not alter the situation, for Virginia, as its statute clearly undertakes to do, may impose an inheritance tax upon her interest despite the fact that she is not the inheritor of the terminated interest of the husband. The extension of the reach of Virginia's inheritance ta[illegible]d not change the rights of tenants by the entirety under its substantive law.

Subjecting the property to the estate tax at current values upon the death of a co-tenant by the entirety while denying the survivor a stepped-up depreciation basis is so inherently inequitable that the Congress changed the rule of the 1939 Code. Under § 1014 of the 1954 Code, the survivor is entitled to the stepped-up basis for depreciation if the co-tenant died after December 31, 1953, 26 USCA 1014, but Congress did nothing to relax the restrictive provisions of § 113(a) (5) of the 1939 Code if the death of the decedent occurred prior to January 1, 1954.

The taxpayer contends that the unqualified repeal of § 113(a) (5) of the 1939 Code and the substitution of § 1014 of the 1954 Code gives the taxpayer the right to take depreciation under § 1014 for a tax year beginning after December 31, 1953, even though § 113 of the 1939 Code would

[1] 29 T. C. 674.

govern her basis in computing her 1939 income tax. The argument is that the cost basis is not an inflexible thing and is redeterminable each year under the provisions of the then applicable law. Doubtless the Congress could permit a redetermination of cost basis, though it be dependent initially upon a taxable event occurring when different rules of an earlier act were applicable.

However appealing the equities of the taxpayer's situation here, we cannot find that the Congress did provide for a redetermination of previously fixed cost bases. The reasonable rule of Section 1014[2] is limted by paragraph (b) (9) to those cases in which the decedent died after December 31, 1953. We find nothing in paragraph (a), or elsewhere in the 1954 Code, which modifies or overrides this express limitation, and are forced to the conclusion that Congress intended to restrict the liberalized rule in accordance with its clear expression in Section 1014 (b)

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[2] "Sec. 1014. BASIS OF PROPERTY ACQUIRED FROM A DECEDENT.

"(a) *In General.*—Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the date of the decedent's death, or, in the case of an election under either section 2032 or section 811(j) of the Internal Revenue Code of 1939 where the decedent died after October 21, 1942, its value at the applicable valuation date prescribed by those sections.

"(b) *Property Acquired from the Decedent.*—For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

* * * * * * *

(9) In the case of decedents dying after December 31, 1953, property acquired from the decedent by reason of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), if by reason thereof the property is required to be included in determining the value of the decedent's gross state under chapter 11 of subtitle B or under the Internal Revenue Code of 1939 * * *"

(9). It is true that in Section 1052(c) of the 1954 Code, Congress expressly provided for the continuation of a basis previously determined under Sections 113(a) (6), (7), (8), (13), (15), (18), (19) or (23) of the 1939 Code. The omission of any reference to paragraph (5) suggests that Congress may have contemplated a readjustment of the basis in this situation to the value at the date of death of the decedent even though occurring prior to January 1, 1954. What inference we may draw from the omission in Section 1052(c) must give way, however, to the express limitation in Section 1014(b) (9). If, as the taxpayer speculates, that limitation got in by inadvertence, Congress may remove it, but, until then, the Court may not disregard it.

Taxpayer also seeks to recover the difference in the tax paid upon her 1954 income and the amount of tax which would have been due if a husband and wife reported the same income and deductions upon a joint return. Permitting married taxpayers to use the split income device of § 2 of the 1954 Code, 26 USCA § 2, while withholding the privilege from single persons, she says is such an arbitrary and unreasonable discrimination that it cannot be allowed under the Constitution. Classification of taxpayers according to marital status is not unreasonable, however, and there was much reason behind the purpose to equalize the tax burden as it falls upon married couples in common law states in comparison with those in community property states. The fact that the change gave a proportionately greater tax reduction to married couples with large incomes is wholly irrelevant; if the rapid acceleration of the progressive tax rates ran afoul of no constitutional guaranty, a slight withdrawal may not be said to have done so.

We find no merit in the taxpayer's contentions.

Affirmed.

UNITED STATES COURT OF APPEALS
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No. 7717.

ANTOINETTE M. FARACO, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ON PETITION to Review the Decision of the Tax Court of the United States.

THIS CAUSE came on to be heard on the transcript of the record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the said Tax Court of the United States, in this cause, be, and the same is hereby, affirmed.

November 3, 1958.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

Filed November 3, 1958.

R. M. F. Williams, Jr. *Clerk.*

A true copy, Teste :

RICHARD M. F. WILLIAMS, JR., *Clerk,*
U. S. Court of Appeals for the Fourth Circuit.

(Seal)

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U. S. Constitution:

ARTICLE 1, SECTION 1, CLAUSE 3:

> "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

ARTICLE 1, SECTION 9, CLAUSE 4:

> "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

FIFTH AMENDMENT:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FOURTEENTH AMENDMENT, SECTION 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SIXTEENTH AMENDMENT:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Internal Revenue Code of 1954:

"SEC. 2. TAX IN CASE OF JOINT RETURN OR RETURN OF SURVIVING SPOUSE.

"(a) Rate Of Tax.—In the case of a joint return of a husband and wife under section 6013, the tax imposed by section 1 shall be twice the tax which would be imposed if the taxable income were cut in half. For purposes of this subsection and section 3, a return of a surviving spouse (as defined in subsection (b)) shall be treated as a joint return of a husband and wife under section 6013."

"SEC. 1014. BASIS OF PROPERTY ACQUIRED FROM A DECEDENT.

"(a) In General.—Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the date of the decedent's death, or, in the case of an election under either section 2032 or section 811(j) of the Internal Revenue Code of 1939 where the decedent died after October 21, 1942, its value at the applicable valuation date prescribed by those sections.

"(b) Property Acquired from the Decedent.—For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

* * * * *

"(9) In the case of decedents dying after December 31, 1953, property acquired from the decedent by reason of death, form of ownership, or other conditions

(including property acquired through the exercise or non-exercise of a power of appointment), if by reason thereof the property is required to be included in determining the value of the decedent's gross estate under chapter 11 of subtitle B or under the Internal Revenue Code of 1939. In such case, if the property is acquired before the death of the decedent, the basis shall be the amount determined under subsection (a) reduced by the amount allowed to the taxpayer as deductions in computing taxable income under this subtitle or prior income tax laws for exhaustion, wear and tear, obsolescence, amortization, and depletion on such property before the death of the decedent. Such basis shall be applicable to the property commencing on the death of the decedent. This paragraph shall not apply to—

(A) annuities described in section 72;

(B) property to which paragraph (5) would apply if the property had been acquired by bequest; and

(C) property described in any other paragraph of this subsection."

"SEC. 7851. APPLICABILITY OF REVENUE LAWS.

"(a) General Rules.—Except as otherwise provided in any section of this title—

"(1) Subtitle A.—

"(A) Chapters 1, 2, 4, and 6 of this title shall apply only with respect to taxable years beginning after December 31, 1953, and ending after the date of enactment of this title, and with respect to such taxable years, chapters 1 (except sections 143 and 144) and 2, and section 3801, of the Internal Revenue Code of 1939 are hereby repealed.

* * * * *

"(C) Any provision of subtitle A of this title the applicability of which is stated in terms of a specific date (occurring after December 31, 1953), or in terms of taxable years ending after a specific date (occurring after December 31, 1953), shall apply to taxable years ending after such specific date. Each such provision

shall, in the case of a taxable year subject to the Internal Revenue Code of 1939, be deemed to be included in the Internal Revenue Code of 1939, but shall be applicable only to taxable years ending after such specific date. The provisions of the Internal Revenue Code of 1939 superseded by provisions of subtitle A of this title the applicability of which is stated in terms of a specific date (occurring after December 31, 1953) shall be deemed to be included in subtitle A of this title, but shall be applicable only to the period prior to the taking effect of the corresponding provision of subtitle A.'"

Internal Revenue Code of 1939:

"SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

"(a) Basis (Unadjusted) of Property.—The basis of property shall be the cost of such property; except that—

* * * * * *

"(5) Property Transmitted At Death.—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * *"

Treasury Regulations promulgated under the Internal Revenue Code of 1954:

"Reg. (T.D. 6265, filed 11-6-57.) § 1.1014-1. *Basis of property acquired from a decedent*—(a) *General rule.* The purpose of section 1014 is, in general, to provide a basis for property acquired from a decedent which is equal to the value placed upon such property for purposes of the Federal estate tax. Accordingly, the general rule is that the basis of property acquired from a decedent is the fair market value of such property at the date of the decedent's death, or, if the decedent's executor so elects, at the alternate valuation date prescribed in section 2032, or in section 811(j) of the Internal Revenue Code of 1939. Property acquired from a decedent includes, principally,

property acquired by bequest, devise, or inheritance, and, in the case of decedents dying after December 31, 1953, property required to be included in determining the value of the decedent's gross estate under any provision of the Internal Revenue Code of 1954 or the Internal Revenue Code of 1939. * * *

* * * * *

"Reg. (T.D. 6265, filed 11-6-57.) § 1.1014-2.—*Property acquired from a decedent*—(a) *In general.* The following property, except where otherwise indicated, is considered to have been acquired from a decedent and the basis thereof is determined in accordance with the general rule in § 1.1014-1:

"(1) Without regard to the date of the decedent's death, property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, whether the property was acquired under the decedent's will or under the law governing the descent and distribution of the property of decedents. * * *

* * * * *

"(b) *Property acquired from a decedent dying after December 31, 1953*—(1) *In general.* In addition to the property described in paragraph (a) of this section, and except as otherwise provided in subparagraph (3) of this paragraph, in the case of a decedent dying after December 31, 1953, property shall also be considered to have been acquired from the decedent to the extent that both of the following conditions are met: (i) the property was acquired from the decedent by reason of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), and (ii) the property is includible in the decedent's gross estate under the provisions of the Internal Revenue Code of 1954, or 1939, because of such acquisition. The basis of such property in the hands of the person who acquired it from the decedent shall be determined in accordance with the general rule in § 1.1014-1. * * *"

"Reg. (T.D. 6265, filed 11-6-57.) § 1.1014-4.—*Uniformity of basis; adjustment to basis*—(a) *In general.* (1) The basis of property acquired from a

decedent, as determined under section 1014(a), is uniform in the hands of every person having possession or enjoyment of the property at any time under the will or other instrument or under the laws of descent and distribution. The principle of uniform basis means that the basis of the property (to which proper adjustments must, of course, be made) will be the same, or uniform, whether the property is possessed or enjoyed by the executor or administrator, the heir, the legatee, or devisee, or the trustee or beneficiary of a trust created by a will or an inter vivos trust. In determining the amount allowed or allowable to a taxpayer in computing taxable income as deductions for depreciation or depletion under section 1016(a)(2), the uniform basis of the property shall at all times be used and adjusted. The sale, exchange, or other disposition by a life tenant or remainderman of his interest in property will, for purposes of this section, have no effect upon the decedent. Thus, gain or loss on sale of trust assets by the trustee will be determined without regard to the prior sale of any interest in the property. Moreover, any adjustment for depreciation shall be made to the uniform basis of the property without regard to such prior sale, exchange, or other disposition."

Treasury Regulations 111 promulgated under the Internal Revenue Code of 1939:

"Reg. 111, Sec. 29.113(a)(5)-1 (As amended by T.D. 5687, Feb. 16, 1949, and T.D. 6020, June 17, 1953). *Basis of property acquired by bequest, devise, or inheritance.*—(a) *Property included.* Section 113(a)(5) applies—

"(1) to all property passing from a decedent by his will or under the law governing the descent and distribution of property of decedents;

"(2) to property passing under an instrument which, under section 113(a)(5), is treated as though it were a will, but applies to such property only at the times and to the extent prescribed in section 113(a)(5);

* * * * * *

"(c) *Fair market value.*—For the purposes of this section, the value of property as of the date of the death of the decedent as appraised for the purpose of the Federal estate tax or the optional value as appraised for such purpose, whichever is applicable as provided in paragraph (3) of subsection (b) of this section, or if the estate is not subject to such tax, its value appraised as of the date of the death of the decedent for the purpose of State inheritance or transmission taxes, shall be deemed to be its fair market value at the time of acquisition."